Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3445

Appeal PA13-267

Huron Perth Healthcare Alliance

January 7, 2015

Summary: The appellant submitted a request to the Huron Perth Healthcare Alliance (HPHA) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the HPHA's partnership with respiratory service homecare providers. Relying on section 69(2) of the *Act*, the HPHA denied access to two agreements on the basis that they pre-dated January 1, 2007, but released the amendments to those agreements, which post-dated January 1, 2007. In this order, the adjudicator finds that the original agreements are not excluded from the operation of the *Act* by virtue of section 69(2), and orders the hospital to issue an access decision to the appellant in respect of the original agreements.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 69(2).

Orders and Investigation Reports Considered: Orders MO-2439, MO-3101, and PO-3223.

Cases Considered: *Ontario (Minister of Health) v. Big Canoe*, [1995] O.J. No. 1277 (C.A.); *Ministry of Community and Social Services v. Information and Privacy Commissioner et al.*, 2014 ONSC 239 (Div. Ct.); *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, (Ont. Div. Ct.), leave to appeal refused March 30, 2011, Doc. M39605 (C.A.); *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139 (Div. Ct.).

OVERVIEW:

[1] The issue in this appeal is whether two agreements, both of which on their face pre-date January 1, 2007 but which were amended after January 1, 2007, are excluded from the application of the *Freedom of Information and Protection of Privacy Act* (the *Act*) by virtue of section 69(2) of the *Act*, which provides, in part, that "this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007".

[2] In 1995, the Huron Perth Healthcare Alliance (the HPHA) and a corporate homecare provider (the affected party in this appeal) entered into an agreement with respect to the provision of respiratory services. In 2004, the HPHA and the homecare provider[1] entered into a management services agreement relating to the 1995 agreement.

[3] In 2011, the parties entered into two amending agreements that amended the 1995 and 2004 agreements respectively.

[4] The appellant submitted a request to the HPHA pursuant to the *Act* for access to the following:

> ...all information, including but not limited to records, documents, internal emails, agreements, purchase orders related to the Huron Perth Healthcare Alliance home oxygen and CPAP [continuous positive airway pressure] preferred partnership with homecare providers.

[5] The HPHA identified three records responsive to the appellant's request, notified an affected party pursuant to section 28 of the *Act* and issued a decision denying access to the two records containing information relating to the home oxygen partnership. In so doing, the HPHA relied upon the mandatory exemption for third party information at section 17(1) of the *Act* and the discretionary exemption for economic and other interests of Ontario at section 18(1)(c) of the *Act.* The HPHA provided the appellant with a link on its website to obtain access to the third record, the Notes to Combined Financial Statements relating to the home oxygen joint venture. Finally, the HPHA advised the appellant that no records exist containing information relating to CPAP preferred partnership with homecare providers.

[6] The appellant appealed the decision of the HPHA to this office, objecting to the HPHA's reliance on the above-noted exemptions to deny access to information relating to the home oxygen partnership. The two records in question are listed on an index of records provided to the appellant and this office as:

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[1] The management services agreement and amendment were actually entered into by the HPHA and a company that appears to be related to the home care company. The president of both corporations is the same individual.

- The Amendment to the Joint Venture Agreement dated August 1, 2011
- The Amendment to the Management Services Agreement dated August 1, 2011

[7] During the mediation stage of the appeal, the affected party consented to the disclosure of certain information pertaining to it and the HPHA issued a revised decision granting access to the Amendment to the Management Services Agreement in full, and to the Amendment to the Joint Services Agreement in part, with portions of the latter being withheld pursuant to section 18(1) of the *Act.*

[8] Following receipt of this information, the appellant confirmed that she is not appealing the redaction in relation to the Amendment to the Joint Services Agreement. The appellant advised, however, that she is seeking access to the Joint Service Agreement dated December 21, 1995 and the Management Services Agreement dated September 27, 2004, both of which were referred to in the August 1, 2011 amendments that were disclosed to her. Following further discussions with the mediator, the HPHA notified the affected party pursuant to section 28 of the *Act,* and issued decisions denying access to the two agreements on the basis that these records came into the custody or under the control of the HPHA before January 1, 2007 and are, therefore, excluded from the application of the *Act* by virtue of section 69(2).

[9] The appellant advised the mediator that she is of the view that section 69(2) of the *Act* does not exclude the agreements from the operation of the *Act*. Further mediation was not possible and the file was forwarded to the adjudication stage of the appeal process.

[10] I sought and received representations from the HPHA, the appellant and the affected party. These representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*.

[11] In her submissions, the appellant raised the issue of the allocation of the burden of proof, and all parties provided submissions on that issue.

[12] In this order, I find that section 69(2) of the *Act* does not exclude from the *Act* the Joint Services Agreement dated December 21, 1995 or the Management Services Agreement dated September 27, 2004, and I order the HPHA to make an access decision under the *Act* relating to those records.

RECORDS:

[13] The two records remaining at issue are the following:

- Joint Services Agreement dated December 21, 1995
- Management Services Agreement dated September 27, 2004

[14] In this order, I will refer to the records at issue as either "the records at issue" or "the original agreements".

ISSUE AND DISCUSSION:

[15] The sole issue in this appeal is whether the records at issue fall outside the scope of the *Act* by virtue of section 69(2) of the *Act*. Section 69 of the *Act* provides:

> (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.
>
> (2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

[16] As noted above, the original agreements were entered into in 1995 and 2004 and were both amended in 2011. The HPHA has disclosed the amendments in whole or in part. The appellant takes the position that the amendments to the agreements made in 2011 effectively create, in law, new agreements that post-date January 1, 2007 and that on this basis the original agreements are subject to the *Act*, despite being drafted and entered into prior to January 1, 2007.

Preliminary issue: burden of proof

[17] In her representations, the appellant made arguments about the allocation of the burden of proof. In their reply representations, the HPHA and the affected party provided arguments in response.

[18] Section 53 of the *Act* states:

> Where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in this Act lies upon the institution.

[19] In this appeal, however, the HPHA claims not that the records are exempt from disclosure under the *Act*, but rather that they are excluded from the *Act* under section 69(2). In her representations, the appellant made submissions on the appropriate allocation of the burden of proof. The HPHA and the affected party provided representations on this issue in reply.

[20] I conclude later in these reasons that I do not need to make a determination on which party or parties bear the burden of proof in this appeal. However, due to the considerable attention paid to this issue in the parties' representations, I will address it below.

Representations

[21] The appellant submits that the HPHA bears the burden of proof with respect to its claim that the records are not subject to the *Act* by virtue of section 69(2). The appellant acknowledges that, strictly speaking, the burden of proof allocation set out in section 53 does not apply, because section 69(2) is not an exemption, but rather, an exclusion. However, she urges that I should adopt the approach taken in Order MO-2439, where former Senior Adjudicator John Higgins considered whether section 181 of the *City of Toronto Act* applied to a record. He stated:

> I agree with the city that section 181 of the *COTA* is not an exemption under the *Act*, and strictly speaking, section 42 [the equivalent provision in the *Municipal Freedom of Information and Protection of Privacy Act* to section 53 in the *Act*] therefore does not apply. However, for the reasons that follow, I do not agree that section 181 of the *COTA*, … has the effect of creating an onus on requesters to prove that it does not apply.
>
> Although section 42 is not strictly applicable as assigning an onus of proof where an institution relies on a confidentiality provision in another statute, rather than an exemption under the *Act*, I believe that this section still provides assistance in assessing the question of onus.[2] In my view, section 42 indicates an intention on the part of the Legislature that, where a record is in the custody or under the control of an institution such as the City, the onus of proving non-accessibility under the *Act* rests with the institution. This is consistent with the purpose of the *Act* in section 1(a)(i) to "provide a right of access to information under the control of institutions in accordance with the principle that … information should be available to the public."

[2] Order MO-2439 was decided under the *Municipal Freedom of Information and Protection of Privacy Act*. The equivalent burden of proof provision in the *Freedom of Information and Protection of Privacy Act* is section 53.

Even without relying on section 42, the City's argument that the burden of proof in this case falls on the appellant is without merit and unsustainable in law.

Section 4(1) of the *Act* stipulates that "[e]very person has a right of access to a record or part of a record under the custody or control of an institution unless …" the record is exempt under sections 6 to 15 or the request is frivolous or vexatious. This is the primary section establishing that the *Act* applies to the record holdings of institutions. There are several other sections setting out instances where the *Act* either does not apply (section 52), or records are not accessible because of a prevailing confidentiality provision (section 53). As noted above, the City relies on section 53 in conjunction with section 181 of the *COTA*.

Based on section 53 of the *Act* and section 181 of the *COTA*, the City seeks to prove that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are in fact not accessible because of a prevailing confidentiality provision. The City thus seeks to oust the accessibility of records under the *Act*, which would otherwise be subject to the access scheme established under the *Act* for records under the City's custody or control.

Seen in that light, it is clear that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely. The City wishes to remove the requested record from that positive right. In my view, the law of evidentiary burdens would place the onus of proof to accomplish that objective on the City. Failure by the City to establish the application of section 181(1) of the *COTA* will have the result that the City does not succeed on this point, and the *Act* would be found to apply.[3]

It is also unfair, unreasonable, and contrary to the purpose of the *Act*, cited above, for the City to suggest that requesters have the onus of disproving that section 181 of the *COTA* applies to records they have requested. To discharge such an onus, a requester would need: (1) detailed knowledge of the City's record holdings; (2) knowledge of the precise nature of what records exist in the City's record holdings that may be responsive to his or her request, and (3) knowledge of where copies of such records would be located within the City's records. This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, [1970] O.J. No. 829 (H.C.J.), the onus of proving

[3] The former Senior Adjudicator refers to *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.).

> information that is peculiarly within the knowledge of a party rests with that party, in this case, the City.
>
> For all these reasons, I find that the burden of proving the application of section 181 of the *COTA*, in conjunction with section 53 of the *Act*, falls on the City in this appeal.

[22] The affected party submits that section 53 of the *Act* has no application to exclusions (such as that found in section 69(2)), as opposed to exemptions. The affected party relies on the Ontario Court of Appeal's analysis in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*,[4] where the Court stated, in respect of the exclusion at section 65(6) for employment related records, that by using the words "this Act does not apply", the legislature has distinguished exclusions from exemptions, and exclusions do not engage the balancing of different interests under the *Act* in the way that exemptions do. The affected party submits that confidentiality clauses that prevail over the *Act* are not comparable to exclusions under the *Act*. It submits that confidentiality clauses in the other statutes act as exemptions and the burden of proof may continue to be allocated to the institutions asserting the application of the confidentiality clause. It argues that exclusion clauses are different because they remove the records entirely out of the purview of the *Act.*

[23] Finally, the affected party submits:

> Nor is the burden of proof applicable to exclusions simply because the institution claiming the exclusion has to show that it applies. An institution that claims an exclusion needs to show that the record at issue falls within the four corners of the exclusion. In this case, the hospital needs to show that the record at issue, that is, the agreement came into the custody or under the control of the hospital prior to January 1, 2007. Once that is shown, then the exclusion applies.

[24] The HPHA draws a distinction between the evidential burden of proof and the persuasive burden of proof (also known as the legal burden of proof). It submits that, since the appellant cannot rely on the re-allocation, in section 53, of the usual burden of proof, the appellant bears the persuasive (i.e. the ultimate, legal and fixed) burden of proof on this appeal. That is, the appellant, "as in all normal course appeals", must "prove or lose". The HPHA submits that it bears only an evidential burden to adduce evidence sufficient to persuade me on a balance of probabilities that the records in dispute are excluded from the application of the *Act*, and that it has discharged that burden. The HPHA submits that it is now for the appellant to rebut that evidence by adducing or pointing to other evidence on the record sufficient to persuade me on a balance of probabilities that, notwithstanding the date set out on the face of the original

[4] (2001), 55 O.R. (3d) 355 (C.A.) at para 30, leave to appeal refused [2001] S.C.C.A. No. 507.

agreements and the plain and ordinary wording of section 69(2), the agreements in fact and at law came into the custody or under the control of the HPHA on or after January 1, 2007.

[25] The HPHA also submits that the issue of allocating the persuasive burden of proof only arises if I am unable to decide the matter on the basis of the evidence before me.[5] It submits that legal arguments are not evidence, and that the appellant is relying entirely on novel legal arguments regarding statutory interpretation and legislative intent in order to rebut the date set out on the face of the agreements and the plain and ordinary wording of section 69(2).

Analysis and conclusion

[26] As noted by all parties to this appeal, the *Act* is silent on the issue of which party bears the burden of proving that a record is, or is not, excluded from the operation of the *Act* by virtue of section 69(2).

[27] In The Law of Evidence in Canada,[6] the authors note that there have been various attempts to create formulae to determine the allocation of the burden of proof; for example, the principle that a party asserting an affirmative of an issue must prove it. However, the authors note that since it is merely a matter of choice whether an issue is stated positively or negatively, this principle is of limited usefulness.

[28] The authors also note that where legislation is silent or unclear as to the allocation of the burden of proof, courts must examine the legislation and resolve these problems on a case-by-case basis.[7]

[29] On the distinction between the evidential and the persuasive burden, the authors state:

> The incidence of an evidential burden means that a party has the obligation to adduce evidence or to point to evidence on the record to raise an issue… The evidential burden is a product of the jury system as a trial judge will leave an issue or a case for the jury's consideration only if the evidence is capable of such a determination.[8]

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[5] Here, the HPHA cites *The Law of Evidence in Canada*, 3d ed by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst (Markham: LexisNexis Canada) at §3.14.
[6] *The Law of Evidence in Canada*, 3d ed by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst (Markham: LexisNexis Canada) at p. 115.
[7] Ibid at p. 114.
[8] Ibid at p.92.

[30] The authors note that the discharge of an evidential burden proves nothing, but merely raises an issue.[9] The authors also note that, in civil proceedings, the evidential burden normally coincides with the legal burden for a particular fact or issue, unless a rule of common law or a statutory provision divides the burdens between the parties.[10]

[31] In civil cases, the persuasive burden is more susceptible to being influenced by policy considerations, and a party who traditionally bears the persuasive burden may be able to successfully argue that the burden should be reversed on policy grounds.[11] Policy, fairness and probability may influence the allocation of either the evidential burden or the persuasive burden in order to deal with perceived difficulties of proof by a party, to achieve efficiencies or to level the playing field.[12]

[32] Finally, the authors also point out that in civil proceedings, the persuasive burden does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state of uncertainty, the persuasive burden is applied to determine the outcome.[13]

[33] Recently, in Order MO-3101, Adjudicator Frank DeVries considered the allocation of the burden of proof where the City of Toronto claimed that the records at issue were excluded from the *Act* by virtue of the exclusion at section 52(2.1) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).*[14] After setting out the passage from Order MO-2439 quoted above, Adjudicator DeVries stated:

> I adopt the conclusions of former Senior Adjudicator Higgins, and apply them to the circumstances of this appeal.
>
> In this appeal, the city takes the position that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are not accessible because of the application of the exclusion in section 52(2.1). The law of evidentiary burdens places the onus of proof to establish that on the city, and failure by the city to establish the application of section 52(2.1) will result in a finding that the *Act* applies.
>
> I also agree with the former senior adjudicator that it is unfair, unreasonable, and contrary to the purpose of the *Act* to suggest that requesters have the onus of disproving that the exclusion applies. As

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[9] Ibid at p. 98.
[10] Ibid at p. 97.
[11] Ibid at p. 126.
[12] Ibid at p. 128.
[13] Ibid at p.91.
[14] Section 52(2.1) of *MFIPPA* provides: "This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed".

> stated in Order MO-2439, this would require a requester to have: (1) detailed knowledge of the city's record holdings; (2) knowledge of the precise nature of what records exist in the city's record holdings that may be responsive to the request, and (3) knowledge of where copies of such records would be located within the city's records. This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, the onus of proving information that is peculiarly within the knowledge of a party rests with that party. In this case, the city is that party, as it has the records.
>
> As a result, I find that the burden of proving the application of section 52(2.1) of the *Act* falls on the city in this appeal.
>
> Lastly, the city takes the position that, if there is an onus on it to establish that section 52(2.1) does apply, this onus cannot "be absolute." It states that the city cannot be required to disprove potential connections between a document and a proceeding, if knowledge of the particulars of the connection is not within the city's knowledge.
>
> In my view, this alternative argument does not go to the issue of which party has the burden of proof, but rather, it goes to the weight of the evidence regarding whether the exclusion applies. This evidence can be found, inter alia, in the representations of the parties, the circumstances of the appeal, and the records themselves. I review the evidence in this appeal regarding whether section 52(2.1) applies below.

[34] For the following reasons, I am of the view that the HPHA and/or the affected party would have both the evidentiary and persuasive burden of proving that the *Act* does not apply to the records at issue. However, I find that I do not need to make a determination as to who bears the burden of proof in this case, because I can make a definitive conclusion on the evidence.

[35] As noted by Adjudicator DeVries in Order MO-3101, section 4(1) of the *Act* sets out the basic premise that every person has a right of access to a record in the custody or under the control of an institution. Like section 52(2.1), which was the exclusion at issue in Order MO-3101, section 69(2) provides an exception to that general rule. While I recognize that an exclusion, as opposed to an exemption, raises a question as to whether the records fall within the *Act* at all, I remain of the view that the starting place for the analysis is that records in the custody or under the control of an institution are subject to the *Act*, unless an exemption or an exclusion applies or a confidentiality provision in other legislation prevails. I find support for this view in *Ontario (Minister of Health) v. Big Canoe*,[15] where the Court of Appeal found that the Commissioner had the

[15] [1995] O.J. No. 1277 (C.A.).

power to conduct an inquiry under the *Act*, notwithstanding the position of the ministry that the records at issue were excluded from the *Act* pursuant to section 65. In other words, the *Act* is presumed to apply until such time as it is found not to apply. I also find support in Order MO-2439, where former Senior Adjudicator Higgins stated that "records are accessible under the *Act* unless an exclusion or an exemption applies".

[36] I also agree with Adjudicator DeVries and former Senior Adjudicator Higgins that it is unfair and contrary to the purpose of the *Act* to suggest that requesters have the onus of disproving that such an exclusion applies. As stated in Order MO-2439, this would require a requester to have: (1) detailed knowledge of the institution's record holdings; (2) knowledge of the precise nature of what records exist in the institution's record holdings that may be responsive to the request, and (3) knowledge of where copies of such records would be located within the institution's records. This information would rarely, if ever, be known to a requester.

[37] The HPHA submits that, absent a statutory provision stating to the contrary, an appellant generally bears the burden of proof. I have reservations about this proposition in the context of a statutory scheme such as the *Act*, which is concerned with government accountability, and where knowledge of the evidence will generally peculiarly lie within the knowledge of the institution and/or an affected party, and not the requester. I find that, in the context of the *Act*, the concerns identified above are good policy reasons for allocating that burden to the institution,[16] and not the requester.

[38] However, and as will be seen below, this appeal does not turn on the allocation of the burden of proof. The evidence is clear that the records at issue, on their face, pre-date January 1, 2007 and that the amendments post-date January 1, 2007. This appeal turns upon the implications of that evidence in the context of the *Act* as a whole and section 69(2) in particular. As a result, I do not need to make a finding on the allocation of the burden of proof in this appeal and I decline to do so.

Do the records at issue fall outside the scope of the *Act* by virtue of section 69(2)?

[39] Sections 69(1) and (2) provide:

> (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

[16] In the context of this appeal, there may also exist an argument in favour of allocating the burden of proof to the affected party who, like the institution, has greater knowledge of the records in issue than does the appellant.

> (2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

The original agreements and the amendments

[40] As noted above, the original agreements are the Joint Venture Agreement dated December 21, 1995 and the Management Services Agreement dated September 27, 2004.

[41] The Amendment to the Joint Venture Agreement, which was disclosed to the appellant, is dated August 1, 2011 and states in part:

> Reference is made to a joint venture agreement… (the "Agreement")…
>
> Notwithstanding Article 10.8 of the Agreement, [the affected party] and the Hospital wish to amend and modify the Agreement as follows:
>
> 1. Article 1.2(k) is hereby deleted and replaced with the following: …
>
> 2. Article 1.2(l) is hereby deleted and replaced with the following:
> …
> 3. Article 1.3(e) is hereby added to the Agreement as follows:
> … [four more additions to the Agreement follow]
>
> 8. Article 2, parts 2.1 and 2.2 are hereby deleted and replaced with the following:
> …
> 9. Schedule "A" ("Trademarks"), attached hereto as Exhibit "A" is hereby added to the Agreement.
> [two more schedules, "Materials" and "Respiratory Services" are added to the Agreement]
>
> Subject to the amendments made in this letter agreement, the parties acknowledge and agree the Agreement remains in full force and effect between the parties. To the extent the foregoing provisions conflict with any other provision of the Agreement, the foregoing provisions shall prevail.

> To confirm our mutual understanding and agreement in respect of the foregoing amendments to the Agreement, kindly return a signed copy of this letter agreement to the undersigned at your earliest convenience…
>
> I hereby acknowledge and confirm … that this letter agreement hereby modifies and amends the Agreement as described above.

[42] The Amendment to the Management Services Agreement, also dated August 1, 2011, contains virtually identical introductory and closing wording. The body of the amendment deletes and replaces one section in the original agreement, adds another section and adds a schedule.

Representations

[43] The parties filed extensive representations. Although I refer to them in some detail below, I have not referred to every aspect of them. However, the parties can be assured that I have read and considered their representations in full.

[44] The affected party, citing *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*,[17] and *Rizzo & Rizzo Shoes Ltd.*,[18] submits that:

> … the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[45] The affected party submits that the purpose and wording of section 69(2) are clear: section 69(2) is a threshold jurisdictional question of whether the *Act* applies to a particular record. It submits that the words of section 69(2) clearly state that if a record came into a hospital's custody or control prior to January 1, 2007, then the *Act* does not apply to the records at issue, and that section 69(2) does not contain any additional qualifying language.

[46] The affected party further submits that even if section 69(2) is ambiguous, the Legislative Assembly of Ontario debate on October 27, 2010 makes clear that the Legislature intended that the *Act* would not apply, ever, to materials predating January 1, 2007. It points out that during the course of the debate in question, the NDP's health critic, M. France Gelinas stated:

> Any question you have about a hospital, you will be allowed to ask under freedom of access to information, and they will have a duty to answer.

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[17] 2008 ONCA 366 at para 27.
[18] [1998], 1 S.C.R. 27 at para 22-23.

> You will only be allowed to go back to 2007, so whatever happened before 2007 will continue to be a secret for ever and ever, amen. But at least what happened after 2007 will be accessible under freedom of information, and the NDP thinks it is a good step.

[47] The affected party also relies on Order PO-3223, where Adjudicator Donald Hale held that an employment contract entered into prior to January 1, 2007 was excluded from the *Act*, despite the fact that the agreement continued to operate subsequent to that date. The affected party, however, submits that Adjudicator Hale is in error where he states:

> I accept the evidence of the affected person that there has been no post-January 1, 2007 extension agreement or other contract entered into between the affected person and Niagara Health which incorporated the terms of the earlier agreement. Based on the evidence provided to me by the affected person and Niagara Health, I find that the original contract remained in effect and was not supplanted or adopted by another agreement after January 1, 2007.

[48] The affected party submits that the interpretation of section 69(2) implied in this passage is inconsistent with the intention of section 69(2), renders it meaningless, and adds unnecessary complexity to the application of the *Act* to hospitals.

[49] The affected party submits that the original agreements were executed in 1995 and 2004 and came into the custody and under the control of the HPHA prior to January 1, 2007. It submits that the amendments executed in August 2011 were to act as standalone agreements with very specific terms and purposes. Specifically, the amendments were created to incorporate into the parties' relationship rights and obligations respecting intellectual property that had not been contemplated when the records at issue were originally executed.

[50] The affected party submits that, in the event that I accept the reasoning in Order PO-3223 that an extension agreement or other agreement which incorporates the terms of an earlier agreement brings the earlier agreement within the *Act*, the amendment agreements in this appeal are not such agreements. While the amendment agreements in this appeal make reference to the agreements at issue, they are not extension agreements, nor do they incorporate the terms of the earlier agreements; rather, they add new terms.

[51] Finally, the affected party submits that if the reasoning in Order PO-3223 is accepted, institutions and the IPC would be required to determine whether any record requested that came into the custody or control of a hospital prior to January 1, 2007, has been supplanted or adopted, and that this is a complicated and unnecessary exercise in what ought to be a straightforward application of section 69(2).

[52] The HPHA adopted the representations of the affected party.

[53] The appellant submits that, contrary to the affected party's assertion that the original agreements are merely referred to in their respective amendments, the responsive records consist of the Joint Venture Agreement as amended by the 2011 amendment, and the Management Services Agreement as amended by the 2001 amendment. The appellant notes that the amendment to the Joint Venture Agreement deletes and replaces certain provisions of the Joint Venture Agreement, as well as adding three schedules. The amendment to the Management Services Agreement deletes and replaces the services to be provided by a named hospital, adds a grant of a licence from the named hospital to the affected party, and adds a schedule related to the services to be provided by the affected party. The appellant argues that, as a matter of law, one cannot separate different sections of a contract with respect to those parts which came into the hospital's custody or control prior or subsequent to January 1, 2007, and that section 69(2) must be interpreted in the context of the responsive record as a whole.

[54] The appellant refers to the purposes of the *Act* as set out in section 1(a)(i) and (ii). She also submits that the intention of the Legislature in enacting section 69(2) can be gleaned from the legislative debates surrounding the passage of the *Broader Public Sector Accountability Act*, *2010*, during which the Minister of Health and Long-Term Care stated that the legislation was intended to bring a higher level of accountability and transparency to public sector organizations. The appellant submits that this purpose would not be accomplished if the interpretation of section 69(2) proposed by the HPHA and the affected party were adopted; hospitals could continue to shield pre-January 1, 2007 contracts from disclosure by amending them *ad infinitum* with no accountability and no requirement that the financial interests of taxpayers would be protected.

[55] The appellant cites with approval Order PO-3223, discussed above, including the passage with which the affected party and the HPHA take issue.

[56] The appellant submits that the amending agreements cannot be viewed as "standalone agreements", since, by their very nature, their intention is to add to, delete from, modify and/or confirm the terms of the original agreements. The appellant argues that the amendments did not merely refer to the original agreements, but resulted in the creation of records that come into the custody and control of the HPHA after January 1, 2007. She submits that it is hardly an onerous task for a hospital to search for its contracts, note their dates and the dates of any amendments to determine which records are subject to the *Act*.

[57] In reply, the affected party refers to the decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy*

Commissioner)[19] and submits that the "purposes" section of the *Act* does not mandate the introduction of language into a statutory provision that is otherwise clear. It submits that section 69(2) of the *Act* is clear on its face and excludes pre-2007 records from the operation of the *Act*. It submits that a determination that the *Act* applies to records that came into the custody or under the control of a hospital pre-2007 based on post-2007 actions or references to such records introduces the very ambiguity that the Court of Appeal ruled must be avoided.

[58] The HPHA, in its reply representations, submits that, when section 69(2) was enacted, the Legislature could have included language to the effect that any agreements and records which remained operational after January 1, 2007, or which were amended after January 1, 2007, would be subject to the *Act*, but did not do so.

[59] The HPHA also submits that adopting the appellant's interpretation of section 69(2) would result in confusion in the interpretation of section 65 of the *Act*, which enumerates several exclusions to the operation of the *Act*. The HPHA argues that, although the section 69(2) is a "point in time" exclusion and the section 65 exclusions are blanket exclusions, the appellant's argument applies with equal force to the interpretation of the section 65 exclusions, and any reference or cross-reference to terms or provision contained in a responsive record to an excluded record could bring that excluded record within the application of the *Act* based on the argument that the excluded record was incorporated by reference into the responsive record or that the responsive record cannot be contextualized without reviewing the excluded record. The HPHA submits that this outcome would be demonstrably contrary to the intent of the Legislature in enacting sections 65 and 69(2). It submits that the correct way to interpret section 69(2) is with reference to physical documents and physical possession.

[60] The HPHA also takes issue with the appellant's submission that, as a matter of law, one cannot separate different parts of a contract with respect to those parts which came into the hospital's custody or control prior to or subsequent to January 1, 2007. The HPHA submits that the concept of partial exemption, the purpose of which is to ensure that as much of a responsive record as can be disclosed under the *Act* is disclosed, should apply equally to exclusions.

Analysis and conclusion

[61] For the reasons that follow, I find that the records at issue are not excluded from the operation of the *Act* under section 69(2).

[19] (2001), 55 O.R. (3d) 355 (ONCA) at para 30, leave to appeal refused [2001] S.C.C.A. No. 507.

[62] To begin, I note the "purposes" section of the *Act*, which states in part that the purposes of the *Act* are:

> (a) To provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific

[63] While clause (ii) only refers to exemptions, there is judicial support for also adopting a purposive interpretation of the exclusions listed in the *Act*. In *Ministry of Community and Social Services v. Information and Privacy Commissioner et al.,*[20] the Ontario Divisional Court, in upholding Order PO-2917, rejected the ministry's broad interpretation of the exclusion for labour relations records at s. 65(6), finding that the ministry's interpretation could potentially exclude routine operational records from *FIPPA* and "subvert the principle of openness and public accountability that the *Act* is designed to foster."

[64] I find that the amendments in this case are not standalone agreements, because they modify the terms of the original agreements between the parties and are clearly intended to be read with the original agreements. The amendments go beyond merely referring to the original agreements; they add to, delete from, and replace provisions found in the original agreements, and they confirm the continued operation of the remainder of the original agreements. They also provide that to the extent the provisions in the amendments conflict with any other provision of the original agreements, the provisions in the amendments shall prevail. I further rely upon Article 10.8 of the original agreement but cannot provide further explanation of my reasoning in this regard because to do so would require me to reveal the content of that Article in the original agreement (of which the HPHA and the affected party resist disclosure). I find that once the amendments were executed, the original agreements ceased to operate as a matter of law and were superseded by new agreements in the form of the original agreements, as amended on August 1, 2011. Therefore, the agreements, as amended, came into the custody and control of the HPHA after January 1, 2009, and the responsive records include both the original agreements and the August 2011 amendments.

[65] I do not accept the HPHA's argument that the correct way to interpret section 69(2) is with reference to physical documents and physical possession. While "custody" is not defined in the *Act*, many previous orders of this office have found that "custody" is not synonymous with physical possession.[21] The Divisional Court has held that a

[20] 2014 ONSC 239 (Div. Ct.)
[21] See, for example, Orders P-994, P-1151

purposive approach must be taken to the interpretations of the words "custody" and "control" in the *Act*, and that the intent of the legislature in drafting freedom of information legislation is to enhance democratic values by providing its citizens with access to government information.[22] In this case, the purpose of the legislation is furthered by interpreting "custody" as not being synonymous with physical possession.

[66] The HPHA argues that the logical extension of the appellant's argument is that the mere reference to a document that would otherwise be excluded from the *Act* would bring it within the scope of the *Act*. I disagree. My finding that the earlier agreements are subject to the *Act* is not based on the fact that they are merely referred to in the amendments, but on the fact that the amendments created, in law, new agreements that came into the custody and control of the HPHA after January 1, 2007.

[67] The parties made reference to Order PO-3223. I find that the facts in this appeal are distinguishable from those in Order PO-3223. In that appeal, an agreement executed prior to January 1, 2007 continued to operate after January 1, 2007, but was not amended after that date. In this case, the agreements executed prior to January 1, 2007 do not continue to operate in their original form; rather, they are supplanted in part by the amendments executed after January 1, 2007. The HPHA suggests that, even if new agreements were created in law when the amendments were made, then only those provisions in the original agreements that changed would not be excluded from the *Act* by section 69(2). In my view, the HPHA's interpretation is not in keeping with the purposes of the *Act*, as it would result in the disclosure of information that has little or no meaning: specific provisions of the agreements are not meaningful taken in isolation from the agreements as a whole.

[68] I also do not find that this interpretation results in unacceptable ambiguity for institutions who are responding to requests for information. Where an institution locates an amending agreement that post-dates January 1, 2007, it should be a fairly simple matter to locate the original agreement to which the amendment relates and, where the original agreement pre-dates January 1, 2007, to determine whether the amendment incorporates the original agreement so as to bring it within the scope of the *Act.*

[69] This interpretation is also in keeping with the objects of the *Act*. Accountability for expenditures of public funds requires access to information in contracts entered into by government institutions.[23] I find that it would be contrary to the intention of the *Act* to find that an agreement that was extended and modified post-January 1, 2007 is outside the scope of the *Act*. I agree with the appellant that to accept the interpretation advanced by the HPHA and the affected party would permit hospitals and

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[22] *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, (Ont. Div. Ct.); leave to appeal refused March 30, 2011, Doc. M39605 (C.A.)

[23] *Miller Transit Ltd. V. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139 at para 44.

third parties to withhold the terms of contracts entered into after January 1, 2007 by simply adopting provisions from agreements that pre-dated 2007.

[70] I conclude that section 69(2) of the *Act* does not apply to the Joint Services Agreement and the Management Services Agreement and that these records are within the scope of the *Act*.

ORDER:

1) I allow the appeal. The records at issue are not excluded from the operation of the *Act* under section 69(2).

2) I order the HPHA to issue an access decision under the *Act* with respect to the records at issue. For the purposes of that access decision, the date of this order is to be treated as the date of the request for access.

Original signed by: January 7, 2015
Gillian Shaw
Adjudicator